United States Postal Service *and* Philadelphia PA Area Local, American Postal Workers Union a/w American Postal Workers Union, AFL–CIO. Cases 4–CA–18673-P and 4–CA–18745-P

September 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On April 10, 1991, Administrative Law Judge Bernard Ries issued the attached decision. The General Counsel, the Charging Party and Intervenor American Postal Workers Union, AFL–CIO, and the Respondent filed exceptions and supporting briefs. The Charging Party and Intervenor and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. BACKGROUND

This case concerns the scope of the Respondent's duty, if any, to (1) bargain over the implementation of hiring practices that are alleged to discriminate against applicants for employment on the basis of personal characteristics such as race or sex, and (2) provide requested information that is relevant to the Unions' concerns over the allegedly discriminatory hiring practices. Another issue, assuming such a duty existed, is the identity of the labor organization—the National or the Local Union—to which the Respondent's duty ran.

The American Postal Workers Union (the Intervenor or the National) is the exclusive bargaining representative of the Respondent's postal clerks, motor vehicle employees, special delivery messengers, and maintenance employees. Recognition is embodied in a national agreement between the Respondent and the National, which was effective by its terms from July 21, 1987, through November 20, 1990. Although the National is the recognized bargaining agent, article 30 of the agreement provides that the local unions, such as the Charging Party (the Local), may play a limited role in bargaining over certain specified local matters.

The underlying events are related in detail in the judge's decision. In brief, they are as follows. In June 1989, the Local's president, Greg Bell, read a newspaper report of remarks made by Philadelphia Postmaster Charles James to the Postal Service Board of Governors to the effect that Hispanics and white women were underrepresented in the Philadelphia division's work force and that the Respondent was attempting to increase employment of members of the underrepresented groups. Bell protested to James, accusing him of attempting to foment racial tension in the work force and questioning the basis of his statements. James replied that the Respondent's hiring policies would not and could not be changed.

In January 1990,[1] notices were posted in Philadelphia post offices announcing that the Respondent was implementing a new method of processing applications for clerk and carrier positions. Dubbed ''OPTEX,''[2] the new procedure involved random selection, by computer, of applicants to take the Respondent's examinations for establishing eligibility for employment. OPTEX departed from past practices only in that, under the new system, not all applicants would be given the opportunity to take the examinations; previously all applicants were allowed to take the tests.[3] Nothing else about the selection process was changed.

On reading the notice regarding OPTEX, Bell contacted James and objected to the change in policy. In response to Bell's objections, the Respondent provided him with a packet of materials that explained, in a general way, the purposes of OPTEX and the procedures to be followed under the new system.

At roughly the same time that Bell learned of the advent of OPTEX, he began to hear reports that individuals living in the Philadelphia suburbs, but not residents of the central city, had received letters from the Respondent encouraging them to apply for clerk and carrier positions.

On being informed of the mail solicitations, Bell sent James a series of letters, dated February 1, 27, and 28 and March 19, in which he accused the Respondent of having adopted the new hiring procedures in an attempt to restrict employment opportunities of blacks and other minority group members. Taken together, the letters set forth Bell's theory of how the Respondent's procedures might discriminate against minorities. According to Bell, the Respondent's active solicitation of applications from residents of the Philadelphia suburbs not only violated postal regulations,

[1] Unless otherwise noted, all dates are in 1990.

[2] OPTEX is an acronym for either ''Open Testing Experiment'' or ''Optional Program for Examinations.'' Both versions appear in the Respondent's documents.

[3] OPTEX was an experiment designed to lower the cost of the selection process by reducing dramatically the number of individuals tested in large cities such as Philadelphia, where the large numbers of applicants often greatly exceeded the number of job openings. It was also intended to reduce the number of individuals who passed the tests and were placed on eligibility rosters, only to be frustrated because the numbers of people on those rosters were so great that the probability of actually being hired was low. OPTEX was developed by the Respondent at the national level, but was offered only to the 50 largest post offices, including Philadelphia. The postmasters in those cities had the option of accepting or rejecting OPTEX.

but also gave preferential notice of employment opportunities to nonminorities from the suburbs, at the expense of the Philadelphia community, where more minority group members reside.[4] Concerning OPTEX, Bell expressed the belief that the new random selection procedure was inconsistent with postal regulations, and would ''create the potential for manipulation and corruption.'' Moreover, Bell reminded James that, under postal regulations, any applicant who had passed the entrance examination and been placed on the eligibility list for one postal facility could transfer to an eligibility roster at another facility. That being the case, Bell continued, applicants for employment in the largely nonminority suburban locations, who were not subject to random selection (because OPTEX was not in use in the suburbs), could establish their eligibility in the suburbs and later transfer to the Philadelphia register, bypassing in the process the many, largely minority, individuals who had applied in Philadelphia but who had not been randomly selected for testing under OPTEX. Bell also took issue with the Respondent's explanation that one of the goals of the new hiring procedures was to increase the number of white women in the Philadelphia post office; he contended that focusing on white, as opposed to white and nonwhite, women was both discriminatory and in violation of postal and Federal regulations. Bell demanded that the new hiring policies be rescinded and that the Respondent implement hiring procedures consistent with past practices, applicable regulations, and the collective-bargaining agreement.

In his letters, Bell also demanded that the Respondent supply certain information regarding the implementation and operation of the new hiring procedures, the numbers of vacancies and applicants expected (at both the Philadelphia and suburban locations), and the justification for implementing the new procedures, including any regulations allowing their adoption. The details of the information requests are set forth in part III,B, below.

In addition, a grievance was filed on February 9, making the same allegations, in substance, as those contained in Bell's letters, and accusing the Respondent of violating the terms of the collective-bargaining agreement as well as applicable Federal and postal service regulations. The grievance also alleged that the Respondent had implemented its new procedures without notice to or consultation with the Union.

Bell also informed National President Moe Biller and Vice President William Burrus of the dispute over the new hiring procedures, and requested their assistance. By letters dated March 9 and April 24, Biller informed Assistant Postmaster General Joseph Mahon that Biller considered the Respondent's advertising for applicants in the suburbs, as well as the OPTEX random selection program, to be actually or potentially discriminatory. Biller requested that the Respondent provide ''documents describing the hiring program in Philadelphia and the OPTEX program.'' He also requested a meeting with Mahon and other managers who might be knowledgeable about the hiring programs ''to discuss the Union's concerns.''[5]

During this period, as the judge discussed in greater detail, the Respondent contacted Bell several times to explain the purposes of OPTEX and to provide some information about the operation of the OPTEX program. The Respondent attempted to assuage Bell's concerns that OPTEX could be used in a discriminatory fashion by assuring him that the computerized selection process would actually be random. It also informed him that steps were being taken to ensure that all individuals were being equally notified of the existence of employment opportunities. The Respondent did not provide specific responses to most of the requests for information in Bell's letters.

In a letter dated October 2, concerning the hiring program in Philadelphia, Biller informed Mahon that

> the [National] fully endorses and authorizes the . . . Local's request for information at issue there, as well as its complaint that the Postal Service failed to bargain with the APWU prior to implementation. . . . From what we know now, there is strong reason to believe that hiring practices in Philadelphia are racially discriminatory[.] . . . [W]e ask you to reconsider the Postal Service's refusal to provide any of this information, and to express unequivocally its willingness to negotiate on this subject, and to provide further information relevant to the abolition of racially discriminatory hiring practices.[6]

By letters dated October 19 and November 6, Mahon replied, in effect, that because OPTEX applied to applicants, who were not represented by the National, it was not a bargainable matter, and therefore that information requested by the National on October 16, concerning the hiring program in Philadelphia, would not be provided.[7]

[4] Bell relied on labor market data (supplied by the Respondent) indicating that blacks and other minorities made up approximately 40 percent of the labor force in Philadelphia County, but only about 5 percent of the labor force in the four adjacent Pennsylvania counties.

[5] Biller's March 9 letter apparently was not received immediately. He attached a copy of that letter to the April 24 letter, which was received by the Respondent.

The National also made additional information requests during the period in question. Those requests are not the subject of any complaint allegations.

[6] There is no mention of this letter in the judge's decision.

[7] The Respondent's director of human resources, John Marshall, had raised a similar objection to Bell's requests in a letter dated March 12.

II. THE ISSUES

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) by implementing the new hiring procedures in Philadelphia without notifying the National and affording it an opportunity to bargain over the changes.[8] The complaint further alleges that Bell's information requests on February 1, 27, and 28 and March 19 were requests made by the National acting through the Local, and that the Respondent violated Section 8(a)(5) and (1) by failing to furnish the information requested.

The judge recommended dismissal of the allegation that the Respondent unlawfully changed its hiring practices without bargaining. The judge was persuaded by the language of the national collective-bargaining agreement, and that of a related ''Memorandum of Understanding'' between the Local and the Philadelphia post office, that the National had not designated the Local as its agent for purposes of bargaining or making requests for information concerning discrimination in hiring, and that the hiring procedures were not local matters within the sphere of the Local's bargaining authority. He therefore found that no bargaining obligation on the Respondent's part had arisen.

Turning to the allegation that the Respondent unlawfully failed to furnish the requested information, the judge found that, under the Board's decision in *Star Tribune*, 295 NLRB 543 (1989), some of the information was relevant to a colorable claim of hiring discrimination raised by the unions. He also found that, even though the Local was not the bargaining agent for the matters at issue, Bell nevertheless was contractually entitled to information concerning the purely local aspects of those matters, because that information was relevant to the subject of the Local's grievance. Ultimately, the judge found that only a few of the individual items of information were relevant, but that the Respondent's failure to provide those items was unlawful.

The General Counsel and the Unions except to the judge's failure to find that the Respondent unlawfully changed its hiring practices without bargaining. They contend that the judge erred in finding that the Local was not the contractually designated agent of the National for bargaining over the newly adopted hiring practices in Philadelphia, which they argue are local issues. They also assert that, in any event, Biller's October 2 letter constituted an express delegation of bargaining authority to the Local by the National. The General Counsel also contends that, under *Star Tribune*, the Respondent's implementation of the new hiring procedures was a mandatory subject of bargaining because of the allegedly discriminatory aspects of the new system; that the National did not waive its right to bargain over the changes in the hiring policy; and that the National was excused from making a bargaining demand because it had been presented with a fait accompli. The General Counsel and the Unions also except to the judge's failure to find that all the information requested by Bell was relevant and should have been produced.

The Respondent urges that the judge correctly held that the hiring discrimination issue was a matter for bargaining by the National, not the Local.[9] It excepts, however, to the judge's finding that it unlawfully failed to provide information, contending that no duty to bargain or to furnish information arose because the General Counsel and the Unions failed to present legitimate evidence of discrimination, and because whatever right the National may have to bargain over such issues has been waived. The Respondent also argues that the judge erred in ordering it to provide information to the Local, because even if Bell were entitled to receive the information he requested, it would have been in his capacity as the National's steward, not as agent for the Local.[10]

[8] The complaint alleges the failure to bargain as a continuing violation.

[9] However, the Respondent excepts to certain of the judge's specific interpretations of the relevant language of the contracts.

[10] The Respondent candidly admits, however, that although the record does not establish the fact, Bell was a steward certified by the National under art. 17 of the national agreement, and therefore was authorized to receive information concerning at least the purely local aspects of the Local's grievance. (The judge found that Bell was entitled to some of the information he sought, but not because he was a steward.) As the Respondent states at fn. 5 of its brief in support of exceptions, ''To the extent the ALJ intended to hold that Mr. Bell was entitled to the information in his capacity as a steward certified under Article 17 . . . *the respondent would not except to that narrow holding*.'' We take the Respondent at its word.

This concession is consistent with the Respondent's course of dealing with Bell. There is no indication in the record that the Respondent ever told Bell that *he* was not authorized to receive the information he sought. To the contrary, in a letter dated March 12, the Respondent's human resources director, John Marshall, challenged the information request, but only because it involved applicants rather than bargaining unit members. Marshall stated, ''*Inasmuch as you serve as a representative for bargaining unit members*, we are unaware of any bases for your right to information concerning non-bargaining unit members.'' (Emphasis added.) Marshall even invited Bell to inform the Respondent if there was another basis for the information request, thereby implying that Bell would be entitled to receive the information if a legitimate basis existed for the request.

The Respondent does argue, however, that the complaint is defective because the Local, and not the National (with whom the Respondent has the bargaining relationship), filed the charge. The Respondent contends that, absent an amendment to the complaint, the Board might erroneously order it to bargain with the Local, an entity with which it has no bargaining relationship. We reject that argument. It is well established that charges may be filed by ''any person.'' See Sec. 102.9 of the Board's Rules and Regulations. Thus, there is no impediment to the Board's ordering the Respondent to bargain with, and to furnish information to, the National, even though the National did not file the charges in this case. See fn. 44, below.

III. DISCUSSION AND CONCLUSIONS

A. *The Respondent's Duty to Bargain*

For reasons discussed below, we find that the Respondent did not violate the Act when it unilaterally implemented changes in its hiring policies and practices, but that it did violate the Act by not subsequently bargaining about the elimination of the allegedly discriminatory hiring practices established by those changes.

1. The unilateral implementation

Section 8(a)(5) and (d) require an employer to bargain in good faith with its employees' representative concerning wages, hours, and other terms and conditions of employment of bargaining unit employees. An employer wishing to change terms and conditions of employment not embodied in a collective-bargaining agreement is required to notify the bargaining representative in advance of implementing the change, to provide the opportunity to bargain over the change, if the union has not waived its right to bargain. Thus, in the absence of a union's waiver of the right to bargain, an employer's failure to notify the union or afford it the opportunity to bargain before changing unit employees' terms and conditions of employment violates Section 8(a)(5).[11]

As noted above, however, this rule is applicable only when the contemplated change involves the terms and conditions of employment of bargaining unit employees. Thus, when an employer makes decisions involving the interests of individuals outside the bargaining unit, the Board will not find an 8(a)(5) violation if the employer fails to notify the union in advance of implementation[12] unless the ''third-party concern . . . vitally affects the 'terms and conditions' of [bargaining unit employees'] employment.''[13]

Similarly, an employer's changes in hiring practices generally fall into the class of business decisions affecting individuals outside the bargaining unit over which an employer is not obligated to bargain with the union.[14] But in *Star Tribune*, the Board, applying *Pittsburgh Plate Glass* to situations involving applicants for employment, also acknowledged that some decisions respecting hiring policies could ''vitally affect'' the terms and conditions of employment of unit employees. *Star Tribune* addressed the union's claim that a specific practice for hiring unit employees resulted in discrimination on the basis of gender and indicated that such discrimination vitally affected the unit employees' terms and conditions so that, inter alia, ''information concerning actual or suspected discrimination in the hiring process is necessary and relevant to the Union's performance of its statutory duties.''[15]

In applying the holdings of *Pittsburgh Plate Glass* and *Star Tribune* to allegations of refusal to bargain over changes in hiring policies or practices, we shall not find that an employer violates Section 8(a)(5) merely by implementing such changes without first notifying the employees' representative, even if the representative later alleges that the new practices are discriminatory or otherwise vitally affect the terms and conditions of employment of unit employees. To hold otherwise would be, in effect, to permit the exception to the *Star Tribune* rule to swallow the rule itself by requiring employers to bargain before changing any hiring practice, or risk being found in violation of Section 8(a)(5) in the event the bargaining representative were later to raise a colorable claim of discrimination or other factor vitally affecting unit employees. We do not think that an employer that implements facially nondiscriminatory hiring practices should be found to have committed an unfair labor practice in establishing its practice because it did not anticipate the union's later raising a scenario in which those practices could be viewed as discriminatory.[16] In our view, the policies of the Act will be adequately served by allowing employers to choose their hiring practices subject to a bargaining obligation if the union demands bargaining over aspects of the practices that the union has an objective basis for believing may discriminate against protected groups, or otherwise vitally affect unit employees' terms and conditions of employment. Accordingly, we find that the Respondent did not act unlawfully by unilaterally implementing its new hiring policy, and we adopt the judge's dismissal of that allegation.

2. Bargaining over elimination of the allegedly discriminatory practices

We reach a different conclusion, however, with respect to whether the Respondent had a duty to bargain with the National concerning the elimination of the allegedly discriminatory new hiring procedures. As to that issue, we find that the Unions adduced sufficient evidence in support of their allegations of discrimination to trigger an obligation to bargain on the part of the Respondent and, thus, that the Respondent's failure

[11] See, e.g., *Owens-Corning Fiberglas*, 282 NLRB 609 (1987).

[12] *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (*Pittsburgh Plate Glass*).

[13] Id. at 179.

[14] *Star Tribune*, 295 NLRB 543 (1989) (applicants for employment are not bargaining unit employees and thus an employer normally is not obligated to bargain over decisions affecting them).

[15] *Star Tribune*, supra, 295 NLRB at 549.

[16] This case does not involve the implementation of hiring practices that are discriminatory on their face or in obvious effect, and thus that foreseeably would have elicited a bargaining demand. Consequently, we are not required to decide whether the unilateral implementation of facially discriminatory hiring practices violates Sec. 8(a)(5).

to do so was unlawful. In so finding, we do not pass on the judge's finding that only the National, and not the Local, was authorized to demand bargaining over the new procedures, because we find that the National itself unequivocally demanded bargaining over these issues in Biller's October 2 letter. We also find, contrary to the Respondent's contentions, that the National did not waive its right to bargain over issues of hiring discrimination

a. *The National demanded bargaining, and requested information, in its own right*

As the judge noted, the Board held in *Star Tribune* that the employer had not violated Section 8(a)(5) by unilaterally implementing a drug and alcohol screening program for prospective employees. The Board found that such screening of applicants for employment is not a mandatory subject of bargaining,[17] first, because applicants for employment are not bargaining unit employees and, second, because employment requirements such as drug and alcohol testing of applicants do not ''vitally affect'' the terms and conditions of employment of unit employees.[18] But, as the judge continued, the Board in *Star Tribune* also held that, when there is a basis for asserting the existence of *discrimination* in hiring on the basis of personal characteristics such as sex, the employer has a duty to bargain, on request, over the elimination of actual *or suspected* discrimination and to furnish information that is relevant to the asserted discrimination.[19] In this regard, the Board noted that the elimination of actual or suspected sex discrimination is a mandatory bargaining subject,[20] and then explained that ''possible discrimination in the hiring process is so intertwined with possible discrimination in the employment relationship that to bar a union from investigating the hiring process could bar it from effectively seeking elimination of discrimination in the employment relationship.''[21]

The Respondent does not appear to dispute the above propositions.[22] It contends, however, that the Local was not empowered to demand bargaining over the assertedly discriminatory hiring practices; that the National waived its right to bargain over the subject; and that, in any event, there was insufficient evidence of discrimination in this case to trigger an obligation to bargain. We are unpersuaded by these arguments.

First, although each of the parties presents arguments with respect to the issue of whether the Local or the National was the entity empowered to demand bargaining over the allegedly discriminatory hiring practices, we need not resolve that issue. Even if the National was the only entity so empowered, as the Respondent argues, the National plainly *did* demand to bargain over the Respondent's allegedly discriminatory hiring practices, and *did* unequivocally request the same information that had been sought by the Local. In his letter of October 2, National President Biller informed Assistant Postmaster General Mahon that the National ''fully endorses and authorizes the . . . Local's request for information at issue [with regard to the hiring program in Philadelphia, including OPTEX], as well as its complaint that the Postal Service failed to bargain with the APWU prior to implementation,'' and stated that ''there is strong reason to believe that hiring practices in Philadelphia are racially discriminatory[.]'' Biller closed by asking Mahon ''to reconsider the Postal Service's refusal to provide any of this information, and to express unequivocally its willingness to negotiate on this subject, and to provide further information relevant to the abolition of racially discriminatory hiring practices.'' That is a bargaining demand, pure and simple. It is also a clear indication that the National has, in effect, adopted as its own the Local's previous requests for information. Mahon responded by ignoring the National's bargaining demand entirely, and by stating that, because the information sought concerned applicants for employment, who were not represented by the National, the Respondent would not comply with the information request.

We find, therefore, that the National demanded to bargain, and requested the information sought in Bell's letters, in its own right. And, as the Board held in *Star Tribune*, the actual or suspected discrimination in hiring over which the National sought to bargain and to receive information was a mandatory subject for collective bargaining. Thus, unless either of the Respondent's remaining defenses is meritorious, its failure to bargain or to provide relevant information on that subject violated Section 8(a)(5). It is to those defenses that we now turn.

b. *The National did not waive its right to bargain over alleged discrimination in hiring*

The Respondent argues that the National has waived its right to bargain over the implementation of new hiring practices, both by contract and through its prior course of dealing with the Respondent. The Respondent seeks to distinguish *Star Tribune* in this regard on the basis that, in *Star Tribune*, the parties' collective-bargaining agreement contained a nondiscrimination

[17] Cf. *Johnson-Bateman Co.*, 295 NLRB 180 (1989) (drug testing of current unit employees held to be a mandatory bargaining subject).

[18] 295 NLRB 543, 545–548.

[19] Id. at 548–549.

[20] Id. at 548.

[21] Id. at 549.

[22] The Respondent appears to concede that, under *Star Tribune*, suspected hiring discrimination is a mandatory bargaining subject, provided that sufficient evidence of possible discrimination exists to support a bargaining demand. The Respondent's position is that the requisite evidentiary foundation has not been laid in this case. For the reasons discussed below, we reject that contention.

clause which specifically included hiring, whereas the Respondent's agreement with the National prohibits only discrimination against *employees*, and does not mention applicants or hiring. The Respondent also relies on article 7 of the national agreement, which provides that employees shall be hired ''pursuant to such procedures as the Employer may establish.''[23] In this regard, the Respondent correctly observes that article 7 allows the Respondent to establish hiring procedures, and that article 2 of the agreement prohibits discrimination against *employees* on the basis of race, sex, and other personal characteristics. The Respondent argues that, because there is no reference to applicants or the hiring process in article 2, that portion of the contract was not meant to apply to hiring, and, consequently, the Respondent's broad grant of hiring authority in article 7 is not subject to the nondiscrimination strictures of article 2.

We find no merit to the Respondent's waiver arguments. It is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; such waivers must be clear and unmistakable.[24] Applying the ''clear and unmistakable'' standard, we find no waiver of the National's right to bargain over the elimination of actual or suspected discrimination in hiring.

Articles 2 and 7, on which the Respondent relies, cannot be read apart from the rest of the agreement. Thus, article 3 (the management-rights clause) gives the Respondent the exclusive right to hire ''subject to the provisions of [the] agreement and *consistent with applicable laws and regulations*,''[25] presumably including those directed at the eradication of discriminatory employment practices. In addition, article 5 prohibits the Respondent from taking ''any actions affecting wages, hours, and other terms and conditions of employment as defined in Section 8(d) of the [Act] which violate the terms of this Agreement or are *otherwise inconsistent with its obligations under law*.''[26] As the Board said in *Star Tribune*, possible discrimination in hiring is substantially intertwined with possible discrimination in the employment relationship. Consequently, the adoption of discriminatory hiring practices could affect terms and conditions of employment of unit employees by leading to discrimination in the employment relationship, and therefore could constitute an action prohibited by article 5.

Thus, although articles 2 and 7 of the national agreement tend to support the Respondent's argument that the National intended to leave the Respondent a free hand in hiring matters, articles 3 and 5 cast doubt on that proposition, at least as it extends to *discrimination* in hiring. Accordingly, we find that the contract, read as a whole, is ambiguous on the subject of its applicability to hiring discrimination. It follows, therefore, that the Respondent has failed to demonstrate a clear and unmistakable contractual waiver of the National's statutory right to bargain over that subject.[27]

The Respondent also relies on the parties' past practices in support of its waiver argument. Although bargaining history may constitute evidence of waiver of a statutory right, the matter in question must have been fully discussed and consciously explored in bargaining, and the union must have consciously yielded or unmistakably waived its interest in the matter before a waiver will be found on that basis.[28] Those conditions have not been met in this case. The record contains no evidence that the parties have ever bargained over hiring issues, that the National ever indicated that it did not reserve the right to bargain over actual or suspected discrimination in hiring, or, indeed, that the subject of hiring discrimination ever came up in negotiations. Accordingly, the Respondent has failed to demonstrate that the National clearly and unmistakably waived its bargaining rights concerning hiring discrimination in prior negotiations with the Respondent.

Finally, the Respondent's reliance on the administrative law judge's decision in *Postal Service*, 5–CA–19445 (P), et al., JD–252–89 (1989), is misplaced. That case involved the imposition of an applicant drug testing program. Although the General Counsel argued that the National's information request in that case was justified by its need to enforce the nondiscrimination clause of the agreement, the judge noted that the National had not requested the information on that basis, and found no evidence of possible discrimination in the record. Accordingly, the judge addressed his brief analysis of the waiver issue to hiring generally, not to discrimination in hiring. In any event, in that Postal Service case, no exceptions were filed to the judge's decision, which therefore was not reviewed by the Board, and his findings have no precedential force.

[23] The Respondent also notes that the administrative law judge in *Postal Service*, Cases 5–CA–19445 (P), et al., JD–252–89 (1989), found that the National had waived its right to bargain over drug testing of applicants for employment. The judge in that case relied on art. 7 of the national agreement, on his finding that the union had never sought to bargain over hiring issues, and on Burrus' statement that the National did not represent applicants.

[24] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Johnson-Bateman Co.*, supra, 295 NLRB at 184.

[25] Emphasis added.

[26] Emphasis added.

[27] We reject the Respondent's argument that the absence of any reference to applicants in art. 2 should be interpreted to mean that the parties did not intend the agreement's antidiscrimination provisions to apply to the hiring process. The omission of any such reference is, of course, some evidence in support of the Respondent's waiver argument, but it is not dispositive.

[28] *Johnson-Bateman Co.*, supra, 295 NLRB at 185.

c. *There was sufficient evidence of the possibly discriminatory nature of the new hiring practices to give rise to a bargaining obligation*

The Respondent's final argument is that the Unions have failed to present evidence sufficient to support their allegation that the Respondent's new hiring practices were discriminatory and thus that, even under *Star Tribune*, no duty to bargain or to provide information should be found. The Respondent points out that, in *Star Tribune*, there was evidence that a male applicant was allowed to submit a urine sample unobserved, whereas a female applicant had been required to submit a sample while partially unclothed and observed by a nurse. In contrast to this evidence of sex-based disparate treatment, the Respondent continues, the Unions in this case have made only the ''barest claim'' of discrimination, amounting to nothing more than ''mere incantations,'' which should not be found to engender a duty to bargain or to furnish information.

We agree with the Respondent that ''mere incantations'' regarding discrimination in hiring are not enough to trigger a bargaining obligation.[29] However, contrary to the Respondent, we agree with the judge that Bell's allegations were more amply supported.[30] Thus, Bell alleged, on the basis of information he had received, that the Respondent was actively recruiting applicants from the Philadelphia suburbs but not from the central city. That information, combined with labor force data indicating that the Philadelphia suburbs are overwhelmingly white, while the central city is 40 percent nonwhite, could foster a reasonable belief on Bell's part that the Respondent's recruiting efforts were discriminatory in effect, and perhaps in intent.[31] As for the OPTEX program, it would screen out many applicants, most of whom (according to Bell) would be minority residents of the central city. Moreover, according to Bell's information, individuals could apply for employment at the Respondent's suburban facilities, where they would *not* be screened out by computer, and, once on the eligibility lists at those locations, transfer to the eligibility list in Philadelphia. As a result, under Bell's theory, applicants from the predominantly white suburbs could, in effect, bypass applicants from the more heavily nonwhite central city who had been screened out of the selection process in Philadelphia under OPTEX. Thus, even though OPTEX by itself was facially nondiscriminatory, it could be viewed, in conjunction with what Bell believed to be the Respondent's transfer policy, as having the potential for favoring whites over nonwhites in the selection process.

As the Respondent points out, there is evidence in the record that tends to refute the Unions' allegations that the new hiring practices were discriminatory. Thus, in a letter dated February 6, Marshall assured Bell, regarding his concern that preferential notices of employment opportunities were being mailed to suburban residents, that the Human Resources Department was ''taking measures to ensure all individuals are equally notified of the announcement.'' Marshall's letter went on to say that the announcement would be made in the press and through job fairs, and that copies would be posted in all postal facilities. Concerning the mail solicitations, Marshall stated that lists of names and addresses had been obtained, ''representing'' individuals residing ''in the Philadelphia area'' as well as areas ''within the Philadelphia commuting distance.''[32] With regard to Bell's fear that applicants at suburban facilities would be permitted to transfer to the Philadelphia eligibility list, Stephen Moe, the Respondent's director of selection and evaluation in its national employee relations department, testified that, although (as Bell had protested) applicants normally are allowed to transfer from one register to another, transfers to OPTEX registers would not be permitted. Finally, Bell received assurances that the OPTEX program actually did select applicants at random, without regard to personal characteristics, and would operate in a nondiscriminatory fashion.

We are not persuaded, however, that the Respondent's various representations concerning the new hiring practices should have convinced the Unions that there was no substance to their fears that discrimination would occur. Although the judge credited Moe's testimony that transfers to the Philadelphia register would not be permitted, there is no evidence that the Respondent informed the Unions of that fact at any time before the hearing. Thus, at least at the time Bell made his information requests, his belief that transfers to OPTEX registers could take place was based on the Respondent's usual practices. As for the Respondent's assurances that solicitations would be sent to potential applicants in areas besides the suburbs, those statements were vague and imprecise, and did not suggest how many solicitations would be directed at the separate geographical areas (or even specifically what those

[29] Contary to the dissent, ''mere allegations'' or ''bar[e] suspicions'' of discrimination in hiring will not create an obligation to bargain. Here, however, Bell did significantly more than ''merely allege'' discrimination; see discussion in the text below.

[30] We do not pass on the judge's statement that ''not very much at all is needed'' under *Star Tribune* to support a request for bargaining or for information regarding alleged hiring discrimination. Because we find that Bell's showing of possible discrimination was more than adequate, we need not decide what the threshold for adequacy would have been in this case.

[31] That belief could have been reinforced by James' statements in 1989 to the effect that white females were underrepresented in the Philadelphia post office.

[32] Bell received similar assurances in a letter dated March 27 from William Donnelly, the Respondent's regional director of human resources.

areas were).[33] It is not surprising that Bell questioned the Respondent's policy of recruiting in the suburbs, given its claim that OPTEX was implemented because of a surfeit of applicants in central cities. We find, therefore, that although the Respondent's explanations may have called into question the merits of the unions' concerns, they did not render those concerns so bereft of factual support that the Union could not have entertained a reasonable belief, based on all the facts in its possession, that the new hiring practices would operate in a discriminatory manner.[34]

Thus, we have found both of the Respondent's defenses lacking in merit. It follows that, under the principles of *Star Tribune*, the Respondent was obligated to bargain with the National over the elimination of actual or suspected hiring discrimination, and that its failure to do so violated Section 8(a)(5) and (1).[35]

In so finding, we emphasize that we are expressing no view concerning whether the Respondent's hiring practices were intended to, or did, discriminate against members of any group protected by the Federal or state civil rights laws. That is not our province. The only question before us, and the only one we answer today, is whether the Respondent had a duty under the Act to bargain with the National over the elimination of actual or suspected discrimination in hiring, and to furnish information relevant to that subject. For the reasons discussed above, we answer that question in the affirmative.[36]

[33] Also, Bell testified that he believed that solicitations were mailed to Philadelphia residents only after (and, by inference, only because) he had protested the focus on suburban residents.

[34] One of those facts, it will be recalled, was that James had said in mid-1989 that the Respondent would not, and could not, change its hiring practices, and then proceeded to do just that. In these circumstances, it is understandable that the unions did not abandon their concerns solely on the basis of generalized assurances that the new hiring practices were nondiscriminatory.

[35] Under the analysis enunciated in his separate concurring opinion in *Star Tribune*, Chairman Stephens joins his colleagues in finding a bargaining obligation on the part of the Respondent. Thus, Chairman Stephens finds that the National raised more than a bare claim that the Respondent's hiring practices might lead to a work force from which a protected class of individuals would be largely excluded. He finds that the evidence relied on by Bell and the National formed the basis for a coherent and rational theory of how the Respondent's revised practices could result in discrimination, and thus that those practices ''vitally affected'' the terms and conditions of employment of unit employees by potentially altering the composition of the unit work force through unlawful discrimination. Chairman Stephens thus joins his colleagues in finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to bargain over the elimination of actual or suspected discrimination, and by failing to supply information relevant to the National's concerns.

[36] The Respondent and our dissenting colleague are wide of the mark in suggesting that the Board will become a forum for deciding hiring discrimination issues that should be raised with the Equal Employment Opportunity Commission. Under *Star Tribune*, the only ''forum'' to which those issues are relegated is the collective-bargaining process.

B. *The Information Requests*

Because the Respondent was obligated to bargain with the National over the elimination of suspected hiring discrimination, it follows that the Respondent also was required to furnish information on the subject that was relevant and necessary to the National's performance of its functions as the unit employees' bargaining representative.[37] In assessing the relevance of requested information, the Board and the courts employ a liberal, discovery-type standard.[38] The question is, which of the items of information sought by the National are relevant under that standard.[39]

As we have said, Bell sent letters to James dated February 1, 27, and 28 and March 19. The following information requests were contained in the various letters:[40]

February 27

> At a Feb. 9, 1990, meeting, Postal Service representatives informed the Unions and interested parties that the purpose for the new hiring policy is to reduce the cost of testing large numbers of people who will never be hired. On the other hand we were informed that the goal of the new policy is to increase the number of Hispanics and women at the Philadelphia Post Office. Particularly, the Postal Service has said that Hispanics and white women were under-represented, and its goal, under the new hiring policy, and its Affirmative Action Program, is to increase the number of Hispanics and white women. Additionally, the Union was informed that the Postal Service's ''Affirmative Action'' goal, as it related to the new hiring policy, is consistent with federal regulations.
>
> (1) It is my understanding that, consistent with federal regulations, the term ''women'' as an under-represented group includes non-minority as well as minority women. Women, not women of any particular race or nationality, are considered

[37] *Star Tribune*, supra, 295 NLRB at 548–549. Moreover, as the Respondent admits, Bell, in his capacity as a steward certified by the National, was entitled to receive information for the purpose of processing the February 9 grievance.

[38] See, e.g., *Island Creek Coal Co*., 292 NLRB 480, 487 (1989), enfd. mem. 899 F.2d 1222 (6th Cir. 1990).

[39] In addressing the information requests, the judge found that Bell was entitled to receive information that pertained to the Local's grievance, to the extent the information concerned purely local matters (excluding OPTEX, which the judge found to be national in character). For the reasons set forth above, we have found that the National requested the information in its own right. That being the case, we find that the judge improperly narrowed the scope of relevancy to local issues related to the grievance. We need not decide whether the judge's analysis would have been appropriate, had the information request not emanated from the National.

[40] The February 27 letter reiterated all the information requests made in the February 1 letter, and added several others.

as an under-represented group. We believe that an affirmative action plan or recruiting policy that singles out a particular group of women by race or nationality is discriminatory and violative of postal and federal regulations. *Mr. James, it is requested that you supply the Union with any postal or federal regulations supporting your position that women of a particular race or nationality are considered an ''under-represented'' group.*

(2) At the Feb. 9, 1990, meeting, we were also informed that the new hiring procedure (OPTEX) which was implemented at several other facilities, did not include individual direct mailings soliciting applications for employment. We were informed that you made the decision, independent of OPTEX, to give preferential notice of employment opportunities. We believe that preferential solicitation is discriminatory in nature and is violative of the ''publicizing postal opportunities'' provision of postal regulations, which provides for area or group publicizing or posting to the general public. *Mr. James, it is requested that you supply the Union with any postal or federal regulations permitting individual preferential notice of employment opportunities to the homes of selected residents.*

(3) Additionally, official postal hiring regulations, consistent with federal regulations, giving all applicants the right to take the entrance exam and compete, has been in existence for over 50 years. Particularly, the postal hiring regulations giving all applicants the right to take the test has been in existence prior to and subsequent to the 1970 Postal Reorganization Act, consistent with federal regulations. *Mr. James, it is requested that you supply the Union with any changes in existing written postal or federal regulations, or Affirmative Action Policy, supporting the Postal Service's position that all applicants are not entitled to take the entrance exam and compete for postal employment.*

(4) At the Feb. 9, 1990, meeting, we were also informed that the only applicants that will be permitted to automatically take the test are veterans with 10-point preference; all other applicants will be subject to random selection. Notwithstanding the fact that we believe the random selection violates the rights of all applicants to take the test and compete, inclusive of non-10-point preference veterans, *it is requested that you supply the Union with any changes in existing written postal or federal regulations supporting the Postal Service's position that all veterans (applicants) are not entitled to take the entrance exam and compete for postal employment.*

(5) When was the new hiring procedure introduced to the Philadelphia Division, and when did preparation for implementation begin? Please give dates.

(6) Names of all postal officials who approved or concurred with the new method for selecting applicants to be tested for employment at the Philadelphia PA GPO.

(7) Was the new method approved or concurred with by Sam Green, Regional Postmaster General, and/or Anthony Frank, Postmaster General?

(8) Since the new hiring procedure does not permit and schedule all applicants to take the entry examination, please explain how applicants will be randomly selected to take the examination (e.g., how factors such as veteran status, sex, race, residential area, etc., will be factored).

(9) Under the new hiring procedure, does the Postal Service now have the capability to randomly select applicants based on factors such as veteran status, sex, race, residential area, etc.? If so, please explain how.

(10) Why is the new hiring procedure being implemented at the Philadelphia PA GPO?

(11) What are the anticipated vacancies and needs of the Philadelphia PA GPO? Please identify the anticipated vacancies by job title and positions needed within the next 6-12 months.

(12) Please identify the anticipated number of applicants to be hired for the positions of Distribution Clerk, Machine and Clerk/Carrier within the next 6-12 months for employment at the Philadelphia PA GPO?

(13) How many eligibles are listed on the most recent Philadelphia PA register for the positions of Distribution Clerk, Machine and Clerk/Carrier? Please provide a copy of list of eligibles on registers, and all other information/data input into the computer (name, address, race, sex, test score, etc.).

(14) What is the average cut-off score for applicants hired from registers for employment at the Philadelphia PA GPO? If there is no average cut-off score, please explain why thousands of Philadelphia County residents who have taken the examination for these positions, and placed on the registers with scores from 70–80, are generally not hired from the registers.

(15) Past practice has shown that, when applications for employment become available at the Philadelphia PA GPO, the number of applicants from Philadelphia County always exceeds the number of applicants needed. The same is true for Post Offices in other counties, including those in

190 zip code areas.[41] Please explain, if the number of applicants from Philadelphia County exceeds the number needed, why would the Philadelphia Post Office aggressively publicize and solicit applicants from area residents of all 190 associate post office areas?

(16) Names of marketing firms employed, cost to Postal Service, and mailing lists attained, inclusive of all information received by the Postal Service from such marketing firms.

(17) List of all information input into computer pertaining to the applicant pool, under the new hiring procedure.

(18) Upon closing date for applications, a copy of the applicants' pool list, inclusive of the names and addresses of all applicants, and all other information/data input into the computer.

(19) Upon completion of random selection, a copy of the list of all applicants who were selected or permitted to take the test, inclusive of names, addresses, and all other information/data input into the computer.

(20) Upon completion of testing and placement on the eligibility register, a copy of the registers, inclusive of names, addresses, race, nationality and all other information input into the computer.

February 28

(21) Names of all 190 associate offices that have re-opened the entrance exams within the last 12 months, inclusive of copies of announcement notices, and the opening and closing dates for acceptance of applications; and

(22) Identification of the anticipated number of applicants to be hired within the next 6–12 months, inclusive of job title for each 190 associate office.

March 19

(23) How many eligibles are listed on each of the 190 associate offices' most recent area registers for the positions of Distribution Clerk, Machine; Clerk/Carrier; and Mail Handler? Please provide a copy of each eligibility register, inclusive of all other information/data input into the computer (name, address, race, sex, test score, etc.).

(24) How many area eligibility registers are there within the 190 associate offices?

(25) Names of any other post offices within the Philadelphia Division, if any, that may have also been subject to the new method of random selection of applicants to be tested for postal employment.

(26) Names of all 190 associate offices that have re-opened the entrance exams within the last 12 months, inclusive of copies of announcement notices, and the opening and closing dates for acceptance of applications.

(27) Identification of the anticipated number of applicants to be hired within the next 6–12 months, inclusive of job title for each 190 associate office.

(28) What eligibility register does the Phila. Post Office intend to hire from within the next 6–12 months?

(29) When does the Phila. Post Office intend to start testing under the new random selection testing program? And, when is it anticipated that the Phila. Post Office will start hiring from this new eligibility register?

The judge found that the first four requests were ''argumentative in nature'' and did not really seek information. That the requests are argumentative in form is beyond dispute. Contrary to the judge, however, we cannot conclude that they were not actually requests for information. The Unions were challenging the Respondent's new hiring practices as discriminatory, and sought to find out how, if at all, pertinent regulations supported those practices. We find no reason to suppose that the Unions were anything but serious in asking for this information, which we find to be relevant to their concerns over possible discrimination.

Items 5 through 7 ask when the allegedly new hiring procedure was introduced in Philadelphia and the identities of Postal Service officials who approved or concurred in its adoption. Unlike the judge, we find this information relevant. Given that James' statements regarding the underrepresentation of white females and Hispanics in the Philadelphia post office were made in mid-1989, information pinpointing the date of the decision to implement OPTEX in Philadelphia could shed light on the question whether the new system was adopted with discriminatory intent.[42] Knowledge of the identities of involved officials could be relevant in determining whether the implementation of the new hiring practices was strictly a local matter, and thus in determining whether the National or the Local was the appropriate bargaining representative regarding the matters in question.

Items 8 and 9 concern the process of selection of applicants for taking the entrance examination under the OPTEX system. The judge found that those requests ''misunderstand the system and are impossible to answer.'' Although we are inclined to disagree with that characterization, we need not decide the issue because we agree with the Respondent that it promptly explained that selection for testing under OPTEX is

[41] The Philadephia suburbs have zip codes beginning with 190; in Philadelphia proper the zip codes begin with 191.

[42] E.g., if the decision to implement OPTEX was made before the underrepresentation of white women was disclosed, the likelihood that OPTEX was intended to operate to the disadvantage of nonwhites would be lessened.

completely random, and that applicants are not categorized in any way before selection begins. We therefore find that these items of information have, in substance, been provided.

Item 10 asks why the new hiring procedures were implemented. Clearly, that information is relevant to the issue of discrimination. However, we agree with the judge that that information was provided in 1990.

Items 11 through 15 concern job vacancies, applicant flow, eligible applicants, and projected hiring at the Philadelphia post office. We agree with the judge that items 14 and 15 are requests for relevant information. Unlike the judge, we find the information requested in items 11, 12, and 13 also are relevant to the Unions' concerns over possible discrimination in hiring. A comparison of job vacancies, anticipated applicant flow, and currently eligible applicants could aid in assessing the validity of the Respondent's contention that random screening was needed to reduce the excessive numbers of eligible applicants in large cities. That information also is directly relevant to the request in item 15 that the Respondent explain why it had to recruit actively in the suburbs if it already had excessive numbers of applicants from Philadelphia.

Item 16 asks for the names of marketing firms employed in the Respondent's mail solicitations, the cost to the Respondent, and the mailing lists received, including all information received from the marketing firms. We agree with the judge that the names of the firms and the costs to the Respondent already have been provided. Thus, we need not reach the issue of their relevance. In addition, we agree that the Union has not demonstrated the relevance of its broad request for the mailing lists, ''inclusive of all information.'' However, we find that the number of names on the lists, by race and zip code, is obviously relevant to the unions' allegations of discrimination.

Items 17 through 20 refer, as the judge found, to the workings of OPTEX. As such, they are plainly relevant to the Unions' concerns over hiring discrimination.[43]

Items 21 through 24, 26, and 27 deal with the application process and hiring at the suburban post offices. That information was relevant to the Unions' fear that whites from the suburbs would be allowed to transfer to the Philadelphia eligibility register, bypassing nonwhites who were screened out under OPTEX, and it therefore should have been furnished. However, in light of Moe's credited testimony that transfers to OPTEX registers are not, in fact, allowed, we agree with the judge that the information sought in these requests would no longer be of assistance to the Unions, and need not be provided now.

Item 28 asks which eligibility register the Philadelphia post office will hire from in the next 6 to 12 months. The judge found, in effect, that that question referred to the suburban post offices and that it did not constitute relevant information, for the reasons just explained. We disagree. Even though the answer to this question probably is ''the Philadelphia register,'' that answer is not a foregone conclusion. The Respondent should be the one to provide it.

Items 25 and 29 concern random selection in other post offices within the Philadelphia division, and the plans for implementing random selection for testing in Philadelphia. We agree with the judge that both requests are for relevant information.

To the extent that we have found that the National, through both Biller and Bell, asked for relevant information that has not been provided, the Respondent's failure to furnish that information constitutes a failure to bargain in good faith, as alleged, in violation of Section 8(a)(5) and (1). Accordingly, we shall order the Respondent to provide the requested information that we have found still to be relevant, to the extent it has not already done so.[44]

AMENDED CONCLUSION OF LAW

By failing to bargain with the National Union, at its request, over the elimination of actual or suspected discrimination in the Respondent's hiring practices, and by failing and refusing to provide information requested by the National that was relevant to its concerns over possible hiring discrimination, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, United States Postal Service, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain on request with American Postal Workers Union, AFL–CIO (the Union), as the exclusive representative of its employees in the appropriate bargaining units set forth in article 1 of the parties' collective-bargaining agreement effective July 21, 1987, through November 20, 1990, concerning the elimination of actual or suspected discriminatory hiring practices.

(b) Failing and refusing to furnish the Union with requested information that is relevant to, and necessary for, the Union's performance of its functions as the representative of the unit employees.

[43] The judge found that this information was not relevant because it did not concern purely local matters. For the reasons we have already discussed, that is too narrow a standard.

[44] We shall amend the judge's Order to require the Respondent to furnish information to the National rather than to the Local.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union over the elimination of actual or suspected discriminatory hiring practices and, if an understanding is reached, embody it in a signed agreement.

(b) To the extent it has not already done so, furnish the Union with all relevant information requested in its letters of February 1, 27, and 28, and March 19, 1990.

(c) Post at its facilities in Philadelphia, Pennsylvania, copies of the attached notice marked ''Appendix.''[45] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER OVIATT, dissenting.

Contrary to my colleagues, I would dismiss the complaint in its entirety. My disagreement with my colleagues is a fundamental one. I would overrule *Star Tribune*, 295 NLRB 543 (1989), to the extent that it requires an employer to bargain about, and provide information concerning, alleged discriminatory hiring practices covered by Title VII of the Civil Rights Act.[1] Because these hiring practices, discriminatory or otherwise, involve applicants for employment and not unit members, I would find that they are not mandatory subjects of bargaining, and I would not require employers to provide unions with information concerning them.

In *Star Tribune*, the Board initially held, and I agree, that because applicants for employment are not bargaining unit ''employees'' within the meaning of the collective-bargaining obligations of the Act, the implementation of a drug and alcohol testing policy for applicants for employment is not a mandatory subject of bargaining. The Board, however, then went on to find that in light of the union's concerns that the applicant testing was being performed in a manner that discriminated against females, the respondent was required to furnish the union with information concerning the testing of applicants. The Board held that employers have a statutory duty to furnish information about such actual or suspected discriminatory hiring practices. It is this latter holding with which I disagree.

In my opinion, the second holding in *Star Tribune* can be used by a union to swallow the first. It allows a union, relying on mere allegations of discrimination under Title VII, to turn what would otherwise be a nonmandatory subject of bargaining into a mandatory one. In effect, *Star Tribune* gives unions license, based on the barest suspicions of discrimination, to go on an informational ''witch hunt'' and to seek information to which they would otherwise not be entitled under our Act.[2]

The instant case illustrates the dangers of the second holding in *Star Tribune*. This case involves OPTEX, an applicant testing procedure that would be a nonmandatory subject of bargaining under the initial holding in *Star Tribune*. Here, the Union, merely by alleging discrimination, has, in effect, turned the implementation of OPTEX, a nonmandatory subject of bargaining, into a mandatory one, requiring the Respondent to provide the Union with massive amounts of information that is not relevant to its representation of current employees.

I agree with my colleagues that the elimination of unlawful discriminatory hiring must be achieved and that it is properly the concern of all, and certainly of unions, and I am fully mindful of the gravity of those concerns. I believe, however, that the NLRB is not the appropriate forum in which to litigate the appropriateness or relevance of specific information requests concerning discriminatory hiring practices, which would likely involve the Board in an examination of the niceties and details of Title VII law. In my opinion, if a union has reason to believe that an employer's hiring practices are discriminatory for reasons protected under Equal Employment Opportunity statutes, the proper forum in which to pursue that claim is the Equal Employment Opportunity Commission (EEOC), the agency principally charged with the function of eliminating discriminatory hiring practices. That agency's investigatory and conciliation procedures would, in my opinion, better provide the union with the information it requires to enable it to fulfill its responsibilities concerning the elimination of discrimination in the workplace.

---

[45] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] The majority observes that the Respondent ''appears'' to concede that suspected hiring discrimination is a mandatory bargaining subject (fn. 22, supra). In fact, the Respondent has specifically objected to ''the inadequacy of the Board as a forum for Title VII complaints (footnote omitted).'' Respondent's Answering Brief at 14.

[2] The Union in this case is not relying on any collective-bargaining contract provision explicitly authorizing it to seek such information or requiring the Respondent to bargain about discriminatory hiring practices.

The National Labor Relations Act is primarily concerned with the protection of employees engaging in union or other protected concerted activities. While the NLRB is concerned with other types of discrimination against employees,[3] it is not the agency with the most expertise in that area of the law. The EEOC is a more appropriate forum in which to address these allegations. Although the availability of another forum to the parties does not require the Board to stay its hand, I believe as a policy matter that requiring employees to provide information in multiple arenas will not well serve the public interest in eliminating discriminatory hiring practices.

For these reasons, I would not require the Respondent to bargain with the Union concerning OPTEX or provide the requested information. Accordingly, I would dismiss the complaint.

[3] See, e.g., *Independent Metal Workers Local 1 (Hughes Tool Co.)*, 147 NLRB 1573 (1964) (inter alia, rescinding a union's certification for failing to represent African American employees fairly).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with American Postal Workers Union, AFL–CIO as the exclusive representative of our bargaining unit employees, concerning the elimination of actual or suspected discriminatory hiring practices.

WE WILL NOT fail and refuse to furnish information requested by the Union that is relevant to, and necessary for, the performance of its representative functions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union over the elimination of actual or suspected hiring discrimination and, if an understanding is reached, embody it in a signed agreement.

WE WILL furnish the relevant information requested by the Union, as required by the Board.

UNITED STATES POSTAL SERVICE

Dona Nutini, Esq., for the General Counsel.
Suzanne H. Milton, Esq., of Washington, D.C., for the Respondent.
Nancy B.G. Lassen, Esq. (Willis, Williams & Davidson), of Philadelphia, Pennsylvania, for the Charging Party.
Anton J. Hajjar, Esq. (O'Donnell, Schwartz & Anderson), of Washington, D.C., for the Intervenor.

DECISION

BERNARD RIES, Administrative Law Judge. This matter was heard in Philadelphia, Pennsylvania, on January 7 and 8, 1991. The complaint presents two basic issues. The first is whether, on or about January 24, 1990, the Respondent violated Section 8(a)(5) of the Act by implementing, without notice or bargaining, new hiring practices for applicants in the bargaining unit represented by the American Postal Workers Union, AFL–CIO. The second issue is whether, by failing to furnish the Union with information requested by the Local on various occasions in February and March 1990, Respondent again failed to comply with the requirements of Section 8(a)(5). Briefs were received from the parties on or about March 8, 1990. Having reviewed the transcript, the exhibits, the briefs, and my recollection of the demeanor of the witnesses, I make the following findings of fact, conclusions of law, and recommendations.

I. THE BASIC FACTS

Section 10 of the Postal Reorganization Act of 1970, Pub. L. 91–375, which made the National Labor Relations Act applicable to the Postal Service, required that the postal unions which then held ''national exclusive recognition rights'' continue to receive recognition until such time as the Board, through its procedures, decreed otherwise. Since that time, the American Postal Workers Union, AFL–CIO has been the national exclusive bargaining representative of all postal clerks, motor vehicle employees, special delivery messengers, and maintenance employees in the Postal Service.

Like all labor organizations national in scope, the APWU has created local unions throughout the country. The parameters of the authority vested in its locals by the APWU is not spelled out with clarity in this record. The only documented evidence of local authority presented here is the collective-bargaining agreement in effect at material times, which makes various references to participation in the collective-bargaining process and the administration of the agreement by the local unions. For reasons undisclosed, none of the parties has chosen to introduce into evidence the constitution of the APWU, which might be regarded as a promising source of light upon the question of the extent to which the locals have been empowered to act on behalf of the APWU, concededly the exclusive bargaining agent of the employees represented by that national union.

The instant complaint, as noted above, encompasses two distinct allegations—one is the failure to discuss with a local union a change in the Respondent's hiring policy, and the other relates to the Respondent's refusal to provide information to the local regarding the asserted discriminatory aspects of that change—but the essential facts are sufficiently related to warrant discussion en bloc.

The local union in question here is the Philadelphia, Pennsylvania Area Local of APWU; the president of the Local at all pertinent times has been Greg Bell. At the hearing, Bell's substantive testimony began with a recounting of an episode which may be relevant here. In June 1989, Bell read a news-

paper account of a report made by Philadelphia Division Manager (or postmaster) Charles J. James to the Postal Service Board of Governors regarding the effectiveness of the Philadelphia Division's affirmative action program. According to the article (which James did not contradict at the instant hearing), hiring in the Division had resulted in ''an excellent representation'' of black employees, but an underrepresentation of ''Hispanics and white females'' as compared to the proportion of those groupings from which the Division recruits its employees. Bell reacted by writing James a strong letter accusing him of ''an attempt to cause racial tension within the work force'' and of suggesting that ''Blacks are disproportionately represented'' in the complement. Bell charged, inter alia, that James had skewed the figures by taking into account the suburban counties in which associate offices of the Philadelphia Division were located, ''since the percentage of Blacks and other minorities living in other counties is much lower than in Philadelphia.'' Bell sent copies of his letter to the APWU national president, Moe Biller, and national vice president, William Burrus, saying, among other things, that the Local was ''seeking assistance from National in our struggle.'' Neither officer made a written reply. Bell also sent copies to the two Pennsylvania senators and assorted congressmen, in consequence of which a meeting was held in August attended by Senator Arlen Specter and others. Apparently, Bell was satisfied with James' protestation that the basic hiring policy would not be changed, and with public statements thereafter made by James on the subject.

All was quiet on this front until January 1990,[1] when two matters arose which eventually provoked the issuance of this complaint. The first was the posting of a notice in the main (30th Street) and other post offices and locations announcing a ''new method'' of processing applications for clerk and carrier positions. The testimony of record shows that, in the past, all persons desiring to take a postal employment examination were permitted to do so. The January notice publicized a more restricted system, in which not all applicants would be allowed to take the examination for which they had applied, but rather a percentage of applicants would be randomly selected by a computer program to receive testing.

The evidence shows that the Postal Service began in 1986 to experiment with a program called OPTEX, which was designed to limit the testing of unnecessarily large numbers of applicants in order to both husband resources and minimize false expectations in the applicant universe. The program was tested at 23 major postal installations, from Seattle to Denver to Miami, and by 1989 the Service had decided to make the system an option available to the postmasters at the 50 largest post offices, including Philadelphia. I find it inconceivable that national postal union officials did not become aware of this alternative system during its infancy; there is no evidence that any of the national unions complained about or sought to bargain about the new modus operandi.

At about the time that Bell became aware that Postmaster James had opted to apply the OPTEX program to hiring in the Philadelphia Division, he also received word that some citizens located in the suburbs had been mailed solicitations to apply for the new clerk/carrier examinations, while no such solicitations had been mailed to inner-city residents.[2] When he heard about OPTEX, Bell asked James for, and received, information about the system. When he thereafter was told about the asserted limited solicitations, Bell sent James on February 1 an angry letter which discussed both subjects. Bell expressed his ''outrage'' at the adoption of the OPTEX plan, which he believed to be designed ''to restrict access of Blacks and other minorities to postal employment,'' and he alleged that the solicitation gave a preference to suburban residents ''at the expense of the Philadelphia community, where more Blacks and other minorities reside.'' Bell reviewed the flareup of the previous summer and accused James of planning to ''drastically change'' his hiring policy despite his earlier assurances to the contrary. In addition to asking James to furnish him with detailed information about the direct solicitations and, as well, to abandon OPTEX and to reinstate previous hiring and solicitation procedures, Bell posed 11 questions, all related in some way to OPTEX (such as when the system was prepared and introduced in Philadelphia, and the names of all postal officials who ''approved or concurred with'' the adoption of the program there), but none directly addressed to how the random selection was executed.

By letter of February 6, John Marshall, the director of human resources for the Philadelphia Division, replied to Bell's letter. While he did not directly answer most of the questions put by Bell, Marshall generally explained the randomization principle underlying OPTEX, furnished the sources of solicitation addressees (which ''represent individuals residing in the Philadelphia area as well as areas within the Philadelphia commuting distance''), and informed Bell of the various efforts that would be made in the urban area to publicize the application period, which was scheduled to begin on February 12 and end on March 13.

Bell was also invited by Marshall to attend an ''informative session'' about OPTEX to be held for the benefit of postal local unions and other groups on February 9. On February 7 and 9, Bell sent identical letters to Union Officials Biller and Burrus, Senator Specter, Postmaster General Frank, and another national postal official. In these letters, Bell reiterated his belief that OPTEX ''was designed to change the racial makeup of the Philadelphia workforce,'' and he also deplored the direct solicitation of suburbanites. He asked all the addressees to investigate with the objective of causing the Division to jettison OPTEX and ensure unrestricted publicizing of examinations. Also on February 9, Bell attended the meeting at which several postal officials explained OPTEX and answered questions propounded by Bell.

On that same day, the Local filed at the first step of the grievance procedure a grievance alleging that violations of several articles of the bargaining agreement had occurred. The lengthy explanatory text replicated almost verbatim the letters sent by Bell on February 7 and 9 and, like them, sought abandonment of OPTEX. In so doing, Bell repeated the charge made in those letters that James' ''aggressive solicitation of suburban applicants gives preferential notice of employment opportunities to suburban residents at the expense of the Philadelphia community,'' even though Bell ad-

[1] All dates hereafter refer to 1990, unless otherwise indicated.

[2] The shorthand zip code number for the Philadelphia metropolitan area is 191; the number that covers the Philadelphia suburbs is 190.

mitted at the hearing that prior to his February 1 letter, he had been aware that the lists purchased by the Division were composed of residents of both the 190 and 191 postal areas.[3]

On February 21 or thereabouts, Bell received a letter written on behalf of the two national postal officials to whom he had written on February 9, which stated that matters such as he had discussed in his letters ''are normally addressed at the local level where the participants are more knowledgeable about the circumstances of the complaint.'' However, instead of referring the complaint to the Philadelphia Division, Bell's letters were sent ''to our Eastern Regional Office in Philadelphia for review.''

In a letter of February 27, Bell asked James for more information. Eleven of the questions simply duplicated those asked in the February 1 letter. Four new demands were basically argumentative (''Mr. James, it is requested that you supply the Union with any changes in existing written postal or federal regulations, or Affirmative Action policy, supporting the Postal Service's position that all applicants are not entitled to take the entrance exam and compete for postal employment.''). Finally, five new requests were propounded, essentially dealing with the operation and results of the random selection process. This letter was followed by one dated February 28, which made a point about the possibility, under OPTEX, of an applicant transferring eligibility from a roster not generated under OPTEX to the Philadelphia register, and two questions related to this supposition.

On February 23, Bell, signing as president of the Local, filed a charge with the Board. The charge expatiated upon the preceding events in much the same manner as had the letters of February 7 and 9, but added new material which, boiled down, principally accused Respondent of having committed unlawful unilateral action by changing hiring procedures. The remedies sought, such as rescission of the OPTEX system, did not include a request to bargain. On March 12, Human Resources Director Marshall responded to Bell's February 27 letter by saying, in substance, that Respondent was unaware ''of any bases for your right to information concerning non-bargaining unit members.'' Ignoring this rebuff, Bell, on March 19, again wrote James, this time making seven new requests for information, mostly having to do with hiring in the associate offices in the 190 zip code area. Four days later, Bell replied to Marshall's March 12 refusal by arguing that information regarding new hiring practices ''is necessary and relevant to the Union's performance of its bargaining obligation with respect to eliminating discriminatory employment practices.'' On March 20, the Local filed a second charge, this time focussing on the refusal to supply information. On March 27, as had been earlier promised, the Eastern Regional Office sent Bell a letter which outlined the operation of the OPTEX program and supplied some information about the requisitions of addresses for solicitation, but did not undertake to furnish specific responses to the questions asked of the Postmaster General in early February.

[3] Actually, at the hearing, Bell was only asked if he had been aware that ''one of the lists requisitioned by Respondent was a mailing list of high school graduates in the 190, 191 area.'' I cannot help but infer that if Bell had this information prior to February 1, he must also have been cognizant that, as the record shows, Respondent's other requisition—of ''a mailing list of females in the workforce who make $15,000 or less a year and reside in the 191–190 ZIP code areas''—also pertained to both areas.

National President Biller became actively involved in the situation when, on March 9, he wrote to Assistant Postmaster General Joseph Mahon:

> I am disturbed to learn that management in Philadelphia, PA, has concluded that there is an over-representation of blacks in the Postal Service in Philadelphia and intends to advertize for applicants in the suburbs, thereby diluting the pool of black applicants for new vacancies. This appears on its face to be racially discriminatory. In addition, the Postal Service there and elsewhere has instituted a program known as OPTEX. . . . Depending on how this group is selected, additional discrimination could result.
>
> Please provide at your earliest convenience documents describing the hiring program in Philadelphia and the OPTEX program. In addition, I request a meeting as soon as possible with you and responsible managers who are knowledgeable about these programs to discuss the Union's concerns.

Mahon evidently did not receive Biller's March 9 letter, but, when prompted by another letter from Biller on April 24, he responded by denying discrimination, explaining OPTEX, and suggesting that a meeting of the human resources committee on May 4 at which Burrus had raised similar questions about OPTEX and had made a request for information might be an adequate method of channeling this discussion, although that was left up to Biller. Biller evidently decided in favor of letting Burrus carry the ball; the next document in this line is an August 16 letter from the latter to a Postal Service official reminding him that Burrus had requested information about OPTEX by a letter of May 4. A month later, another postal official questioned whether Burrus' inquiry should not have been made, in accordance with the bargaining agreement, by Biller rather than Burrus, and further asked whether the information sought was relevant and necessary, as required by the agreement, since it pertained to applicants. After some fencing, Biller sent a four-page letter on October 16 seeking information both about ''the hiring program in Philadelphia'' and, as well, ''each city in which the OPTEX random selection has been used.'' Eventually, although it imparted a bit of information, Respondent took the position that since OPTEX applies to applicants, and applicants are not represented by the APWU, there was no obligation to furnish the information requested.

II. DISCUSSION AND CONCLUSIONS

The first issue presented, as alleged in the complaint, is whether the Respondent failed to bargain about the adoption of OPTEX when it neglected to give notice and an opportunity to bargain to the Philadelphia Area Local. The threshold question is whether the Local is an agent of the national union for purposes of such bargaining.

As previously indicated, the only record documentation of the relationship between the national and the Local is found in the national bargaining agreement (in point of fact, the agreement that covers the APWU also incorporates the contract between Respondent and the National Association of Letter Carriers, which occasionally results in contractual references to ''the Unions.''). The agreement alludes on occa-

sion to ''local unions'' or variants thereof,[4] and several provisions clearly imply that the locals will perform functions at the post offices without the specific authorization of the national union. An example is the establishment at the thousands of post offices with 50 or more employees of Joint Labor-Management Safety and Health Committees.

However, the only article of the agreement which clearly invests the local unions with the right to bargain is article 30 (''Local Implementation''), which empowers the local parties to bargain for 30 days about ''22 specific items,'' such as additional wash-up periods, that are spelled out in the agreement. There is nothing in the contract which specifies the delegation of bargaining authority to local unions and, indeed, a provision in the Philadelphia local agreement appears to confirm the understanding of the local parties of such an absence of authority. In an article entitled ''Prohibition Of Unilateral Action'' (a title which mimics art. 5 of the national agreement), the parties agree that union officials will always be welcome to discuss with management any matter ''relating to the welfare of employees and the good of the Service'' and, further, that ''Management agrees to consult with the Local Union President (or his/her designee) prior to adopting any local procedure materially different from existing practices where the comfort or welfare of the employees is directly concerned.''

The operative words here, which cogently indicate that collective bargaining in the 8(a)(5) sense was not contemplated in the present circumstances, are ''consult,'' ''local procedure,'' ''materially different,'' and ''directly concerned.'' To consult is not to bargain. OPTEX, while applied locally in Philadelphia, was no more a ''local procedure'' than any other program evolved at the national level and then put into effect at local installations throughout the country. OPTEX was not ''materially different'' from existing practices because postal service regulations (R. Exh. 8, sec. 215.1) already permitted post offices to refuse to give examinations when sufficient applications were thought to be in hand. Finally, it seems extremely difficult to conclude that ''the comfort or welfare of the employees is directly concerned'' with a change in the procedure by which applicants are selected to take entrance examinations.

Thus, it is my opinion that since the only provision between the parties which touches upon the possibility that the Charging Party might be authorized to engage in collective bargaining relates to the 22 items reserved for all local branches of both national unions, the national agreement actually amounts to an agreed-upon restriction of that possibility. APWU might well have delegated agency power to its locals and, if the Respondent had been made aware of that fact, we might have a different situation. But here there is no evidence that APWU authorized its locals to act on its behalf, as the exclusive bargaining agent of the employees in its unit, and what evidence there is has a contrary ring. As set out above, Bell's February 9 letters to Biller and Burrus asked the two national officers to ''investigate this matter'' with the objective of abandoning OPTEX. This is not the attitude of a representative who understands that he possesses the authority to engage in bargaining about the matter himself. Moreover, the alacrity with which the national union became involved in the issue strongly implies that Bell was not thought to be the appropriate bargaining representative to be discussing the problem. On March 9, Biller undertook to write a letter to the Postal Service to request documents and a meeting relating to ''the hiring program in Philadelphia and the OPTEX program.'' On March 15, Burrus wrote to the Postal Service to request a meeting of the Joint Committee on Human Rights ''to discuss the USPS hiring plan and its impact.'' Other correspondence between Biller and the Respondent followed, as discussed above.

It is quite obvious that if the OPTEX plan were to be bargained about at all, that bargaining should have been conducted at the national level. Nothing in the record suggests that APWU, which is the exclusive bargaining representative, has delegated to the 50 locals affected by OPTEX (or, in some other situation, the locals representing the more than 10,000 post offices in the nation) the power to demand bargaining about the adoption of such a program.

Having reached this conclusion, I need not discuss, other than briefly, the other serious problems faced by General Counsel here. In *Star Tribune*, 295 NLRB 543 (1989), the Board held that the employer was not obliged to bargain about the implementation of a drug and alcohol testing program for applicants, because they were not ''employees'' as referred to by the Act and their hiring or nonhiring did not ''vitally affect'' the terms and conditions of employment of the unit employees. General Counsel attempts to distinguish *Star Tribune* by focussing on the alleged discrimination here. A second problem which comes to mind is the notable absence of any request by Bell to bargain about the advent of OPTEX at Philadelphia. His correspondence to Respondent's officials made no bargaining request, even though the program did not take effect until a substantial period of time after he began writing. It was only in the grievance and the charges that Bell made any reference to ''unilateral action.'' Although I am under no illusion that Respondent would have bargained with Bell in any event, the Board has repeatedly held that a union which has notice of a bargainable change must request bargaining in order to hold an employer accountable under Section 8(a)(5), even when the union has filed a grievance or an unfair labor practice charge. *Medicenter, Mid-South Hospital*, 221 NLRB 670, 678–679 (1976); *Citizens National Bank of Willmar*, 245 NLRB 389, 390 (1949); *Haddon Craftsmen*, 297 NLRB 462 (1990).

As previously indicated, however, there is no need to resolve these or other potential issues in view of my conviction that the Local was not armed with the authority to demand bargaining by Respondent about the adoption of OPTEX.

The remaining 8(a)(5) allegation deals with the failure of Postmaster James to supply the information requested by Local President Bell in the letters he wrote on February 1, 27, 28, and March 19. There appears to be a convincing rationale for concluding, at least in the abstract, that Bell was entitled to demand and be supplied with information relating to suspected discrimination.

In *Star Tribune*, supra, although the Board held that the employer did not have to bargain about a drug and alcohol testing program for applicants, as noted above, it also held that the union in that case was entitled to certain information assertedly related to sex discrimination in the implementation

[4] For example, art. 36, which refers to credit unions, begins, ''In the event that Unions signatory to this Agreement or their local Unions (whether called branches or by other names) presently operate or shall hereafter establish and charter credit unions.''

of the program. The Board first noted that a pending grievance regarding the unilateral adoption of the program also alleged violations of, inter alia, a nondiscrimination provision which applied to all phases of employment, including ''testing and hiring.'' It then suggested that the testing procedures may have been discriminatorily applied, based on evidence by a male applicant that he had submitted an unobserved urine sample, while a female applicant testified that she gave her sample partially unclothed and observed by a nurse. On the basis of this rather slender evidence of discrimination, the Board invoked the law which holds that the elimination of discrimination is a mandatory subject of bargaining and that ''requested information concerning applicants for union represented positions is necessary and relevant to a union's performance of its bargaining obligation with respect to eliminating discriminatory employment practices.'' Id. at 548. *Westinghouse Electric Co. v. NLRB*, 239 NLRB 106 (1978), enfd. as modified *Electrical Workers IUE*, 648 F.2d 18 (D.C. Cir. 1980); *East Dayton Tool & Die Co.*, 239 NLRB 141 (1979).

The Board went on to explain the ''significant difference'' between bargaining about applicant testing and requesting information about discrimination in the testing process. A union's legitimate concerns about safety in the workplace can be satisfied by union proposals which seek testing of newly hired employees, a mandatory subject. But if there is discrimination in the hiring process, no employment relationship will ever be consummated, thus omitting the union from the process. Accordingly, ''to bar a union from investigating the hiring process could bar it from effectively seeking elimination of discrimination in the employment relationship.'' Id. at 549. The gist of the Board's reasoning, which is of course gospel in these precincts, is that information about the application process is obtainable, and the subject bargainable, where there may be a basis for claiming discrimination, even though the process is not otherwise subject to bargaining.[5]

What standard is to be applied in determining whether an adequate basis is present for inquiring into the existence of discrimination in hiring? Respondent argues that a ''bare'' claim surely is insufficient, but as I read the Board's decision in *Star Tribune*, not very much at all is needed. In some places, the Board spoke in per se terms: ''[A] union has a legal right as a statutory bargaining representative to ensure that discriminatory practices are not established or continued, and therefore is entitled to information that relates to alleged discrimination;'' ''[R]equested information concerning applicants is necessary and relevant to a union's performance of its bargaining obligation.'' Id. at 548. In characterizing the triggering standard for access to information, the Board used the phrase—and only the phrase—''actual or suspected discrimination on four occasions. The sole evidence that the Board referred to as showing discrimination ''in the hiring process'' was testimony that a male was allowed to provide his urine sample unobserved while a female was observed; surely, this is not an overwhelming basis for believing that one of the genders was the object of discrimination in the drug deselection process and for throwing open the employer's information repository to minute scrutiny, and yet that is what the Board appears to have sanctioned.

Assuming that some showing with more heft than ''suspicion'' is required, we have here James' 1989 report that Hispanic males and ''white females'' were underrepresented in the Philadelphia post office. Although the record is silent as to this issue, it seems questionable that white females constitute a category for which affirmative action is appropriate. There may also be substance in the issue raised as to the inclusion of the undoubtedly nonminority suburban areas in the calculus used to make judgments as to the adequacy of minority representation. As for the OPTEX system itself, it obviously could give rise to many inquiries about its potential effect on discrimination in the post office, although Bell failed, in the main, to ask the more obvious questions. Given the broad and liberal contours indicated by *Star Tribune*, as discussed above, I would think that, in line with that case, it was open season for seeking information about the subject of discrimination here. The foregoing discussion, however, does not put an end to the analysis. It will be asked whether, even assuming that someone had the right to inquire into the subject of discrimination here, Bell would have been that someone, since I have concluded that he (or the Local) had no bargaining rights with regard to the subject of OPTEX. There is a difference between the two subject areas. Article 31, section 3, of the national agreement provides, in pertinent part:

> The Employer will make available for inspection by the Unions all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. . . . Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or his designee. All other requests for information shall be directed by the National President of the Union to the Senior Assistant Postmaster General for Human Resources. Nothing herein shall waive any rights the Union or Unions may have to obtain information under the National Labor Relations Act, as amended.

It would appear that a request for information regarding suspected discrimination would fall within the category of ''information necessary to determine whether to file or to continue the processing of a grievance.'' And it would further appear that Bell could file a grievance related to discrimination in this case. ''Any employee who feels aggrieved'' may file a grievance under the national agreement, and article 15 defines a grievance as follows:

> A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, *but shall not be limited to*, the complaint of an employee or the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement. [Emphasis added.]

[5] Although the Board took note of a nondiscrimination provision which applied in terms to the hiring phase, it did not rely upon the clause in its rationale, and I do not believe that rationale makes such a clause indispensable.

Star Tribune in effect makes discrimination in hiring a bargainable ''condition of employment.'' Arguably, moreover, the underscored language in the second sentence broadens the scope of a grievance to include any sort of dispute. It thus appears that Bell was entitled to inquire with regard to suspected discrimination. That right, however, was not without limitation. As shown above, article 31 required that information requests relating to ''purely local matters'' were to be addressed by the local union to the postmaster, while all other requests ''shall'' be directed by the president of the national union to a designated national official of the Respondent. There was no testimony about the meaning-of-this provision. While there are two instances in the record of postal representatives referring to Bell's complaints as ''local'' in nature, I do not assign much weight to those passing comments in context. In my view, the OPTEX program itself was national in character and could in no wise be considered ''purely local.'' Undoubtedly, every nationwide Postal Service program has ''purely local'' application, but the clear line drawn by the parties here—at least at the extremities—does not admit of considering general information requests about OPTEX as ''purely local'' matters. ''If the parties have agreed to a contractual provision that limits their rights with regard to a term or condition of employment, we will give full effect to the plain meaning of such provision. Where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say the union has 'waived' its statutory right to bargain; rather, the contract will control and the 'clear and unmistakable' intent standard is irrelevant.'' *Electrical Workers IBEW Local 47 v. NLRB*, 927 F.2d 635 (D.C. Cir. 1991).

In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the Supreme Court held that a union which had filed a grievance was entitled to demand information relating to that grievance where there was a ''probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities,'' a standard which the Court labeled ''discovery-type'' in nature. Id. at 437. This right has been recognized even in the absence of a pending grievance, where the information may assist the union in determining whether or not to file a grievance. *Safeway Stores*, 236 NLRB 1126 fn. 1 (1978). On the other hand, ''the obligation to furnish information is not unlimited.'' *Postal Service*, 276 NLRB 1282, 1288 (1985). A union has the ''burden of demonstrating the relevance of the requested information to its administration or enforcement of the collective-bargaining agreement,'' at least in a case where the information is not core data to which the union is presumptively entitled.

I have reviewed the several letter requests made by Bell, as alleged in the complaint, to determine whether Respondent was, for one reason or another, excused from supplying the information sought by the various questions posed by Bell. Of the questions put in the February 1 letter, I conclude that there is no potential relevance in questions numbered (1), (2), (3), (7), (8), and (9); that questions (4) and (5) misunderstand the system and are impossible to answer; that question (6) was subsequently answered; and that questions (10) and (11) seek information which is potentially relevant. As for the letter of February 27, I believe that the first four underlined questions are argumentative in nature and do not really seek information; the next 11 questions simply repeat those posed in the first letter; the 12th question in the series is a new one, but that information was perhaps already known to, and in any event supplied by the Respondent to, Bell (with the exception of ''inclusive of all information received by the Postal Service from such marketing firms,'' which I find to be both onerous and irrelevant); and, as for the last four questions, I conclude that they basically relate to the manner in which OPTEX works, and are therefore not ''purely local'' in character. With respect to the letter of February 28, I believe, in view of the credited evidence regarding the nontransferability of eligibility from the suburban offices to the Philadelphia facilities pool, that the two questions propounded in that letter are not relevant. For the same reason, I find that questions (1), (2), (4), (5), and (6) of the March 19 letter are irrelevant, but that questions (3) and (7) bear indications of potential relevance.

In sum, I find that Respondent did not violate the Act by refusing to bargain with the Local about the institution of the OPTEX program, but did violate Section 8(a)(5) by failing to answer certain questions put by Local President Bell.

CONCLUSIONS OF LAW

1. By, on or about February 1 and March 19, 1990, refusing to furnish certain potentially relevant information to the local union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. In no other respect alleged in the complaint has the Respondent violated the Act.

3. The Respondent is an employer over which the Board has jurisdiction.

4. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.[6]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent should be required to furnish the information as found above and to post the traditional notices.

[Recommended Order omitted from publication.]

[6] The Respondent denied in this case, as it has in other (but not all other) cases, that an APWU local is a statutory labor organization. There can be no doubt at all that these locals are labor organizations as contemplated by the Act.